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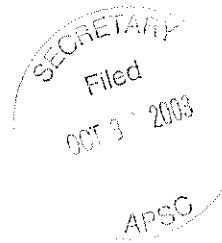
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October 31, 2003

VIA HAND DELIVERY

Walter Thomas, Secretary
Alabama Public Service Commission
P. O. Box 304260
Montgomery, AL 36130-4260



**IN RE: Petition for Declaratory Relief Regarding Classification of Phone –
to-Phone IP Telephony Service; Docket No: 29016**

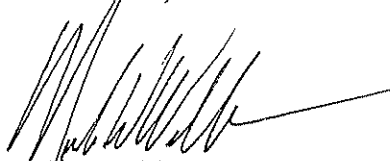
Dear Mr. Thomas:

Enclosed herein for filing with the Alabama Public Service Commission are the original and ten copies of the Initial Comments to be filed on behalf of the Local Rural Exchange Carriers listed in Appendix "A" to the Comments.

If you have any questions, please do not hesitate to contact me.

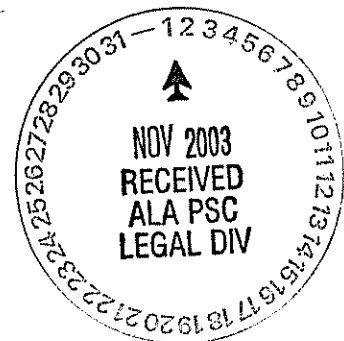
Very truly yours,

BRANTLEY, WILKERSON & BRYAN, P.C.


Mark D. Wilkerson

MDW:cld

Enclosure



**BEFORE THE ALABAMA
PUBLIC SERVICE COMMISSION**

PETITION FOR DECLARATORY)	
RELIEF REGARDING)	
CLASSIFICATION OF PHONE-TO-)	Docket No. 29016
PHONE IP TELEPHONY SERVICE)	
)	

COMMENTS OF PETITIONING ILECS

The Local Exchange Carriers listed in Exhibit "A" (the ILECs), submit the following comments in support of a declaratory ruling that: (1) providers of intrastate phone-to-phone IP telephony service or other Voice over Internet Protocol ("VoIP") configurations (collectively, "IP Telephony") are "transportation companies" as defined by ALA. CODE § 37-2-1 (1975); (2) providers of intrastate IP Telephony are subject to APSC rules applicable to the provision of telephone service; and (3) providers of IP Telephony are responsible for the payment of intrastate access charges for the origination or termination of non-local traffic from or to the public switched telephone network.

I. Introduction.

Every day, thousands of Alabamians pick up a telephone receiver, listen for a dial tone, dial a phone number and when the call is answered communicate with someone on the other end. When such calls originate and terminate in Alabama, this Commission has always interpreted its enabling statute as providing it with the obligation to regulate both the providers of such service and the terms under which such service is provided. The only exception has been in those limited instances where the legislature has granted a specific exemption, such as for CMRS service.

In exercising its jurisdiction, the APSC has balanced the interests of the consuming public with that of carriers by implementing, among other things, a system of intercarrier compensation designed to ensure that the cost of the telephone network is not disproportionately borne by residential customers, particularly those located in high cost rural areas. The Commission has also adopted rules intended to protect the consuming public from unscrupulous carrier practices, such as cramming and slamming.¹ Because it has been able to exercise broad jurisdiction over all wireline providers, the Commission has been able to ensure that the public interest has been protected during the transition to a competitive telecommunications marketplace.

In this proceeding, the Commission must decide whether it will continue to apply its enabling statutes in a consistent manner to all providers of telephone services. It can no longer delay action based on the assumption that the amount of IP Telephony traffic is minimal. Analysts estimate that fully ten percent (10%) of telephone calls now use the Internet, and that in ten years the percentage could be close to one hundred percent (100%). Evan Hansen, *VoIP Firms Battle California Regulators*, CNET News, at <http://news.com.com/2100-7352-5096966.html> (last modified Oct. 24, 2003). As more and more traffic is carried via VoIP networks, less traffic will be carried over other technological platforms. Failure to assert jurisdiction over providers of IP Telephony will inevitably result in a breakdown in this Commission's established regulatory scheme, while the loss of intercarrier compensation streams will ultimately endanger the ability of the ILECs to maintain carrier of last resort obligations.

¹ In some instances, the APSC has required the posting of a bond or letter of credit to ensure that customers are protected from fraud or failure by new market entrants. The number of enforcement actions undertaken by the Commission over the last five years is the best evidence of the importance of its regulatory authority over such providers.

II. What is VoIP?

The term “VoIP,” or “Voice over Internet Protocol,” is used to describe the transmission of voice messages as packetized data over an Internet Protocol-based network. Packet switching is rapidly replacing circuit switching as the dominant technology through which telephone calls are transmitted. In circuit switching, when a call is made between two parties, the connection (“circuit”) is maintained for the entire duration of the call. While circuit switching keeps the connection open and constant, packet switching opens the connection just long enough to send a small “packet” of data from one network to another. An increasing number of ILECs, as well as CLECs, are using packet switching to transmit messages over high capacity facilities. Eventually, it is likely that all of the circuit-switched networks will be replaced with packet-switching technology.

In what has been termed “phone to phone” IP Telephony, telephone instruments are used to transmit calls in a manner that, from a customer’s perspective, is indistinguishable from other telephone calls. In such instance, a device called an analog telephone adapter (ATA) converts analog voice signals to digitized packets. The call is routed to a local server over the local ILEC loop and transmitted to the called party over the IP network. The signal is then converted back to an analog voice call at the receiving end and terminated through the local ILEC loop.²

Providers of IP Telephony advertise their service as indistinguishable from traditional telephone service. For example, Vonage advertises that its customers “get local, regional, and long distance U.S. and Canadian calling” and features like three way calling to Caller ID. Vonage Features, <http://www.vonage.com/features.php> (last visited Oct. 29, 2003). Provider Net

² In a computer-to-computer configuration, analog voice signals are converted to data by software in the computers and transmitted over the public Internet or over a private IP network. This results in a total bypass of the public switched network. In another configuration, a computer is used in conjunction with a traditional telephone on the other end.

International offers the ability to “make calls to any phone from anywhere. . . .” Net International, http://www.netinternational.com/services_voip_telephony.cfm#phonetophone (last visited Oct. 29, 2003).

III. Alabama Law.

The APSC has jurisdiction over “utilities,” which under ALA. CODE § 37-1-30 (1975) includes any company that falls within the definition of a “transportation company.” The term “transportation company” encompasses “every person not engaged solely in interstate commerce or business that now or may hereafter own, operate, lease, manage or control, as common carriers or for hire... any telephone line.” ALA. CODE § 37-2-1 (1975) (emphasis added). When the statute was written, all telephone lines were made of copper and calls were manually “switched” using cord boards. Power for the telephone instrument was obtained by turning a magneto crank. Over time, other technologies, including microwave transmitters, fiber optic lines and digital switches were used to transmit voice messages. Despite these technological advances, the term “telephone line” has consistently been interpreted by the Commission to incorporate any line used to carry telephonic communications.³ Under Alabama law, there is no justification for treating IP Telephony differently from other telephone service.

IV. Federal Law.

On a federal level, there is a continuing dispute over whether the IP Telephony should be considered a “telecommunications” or “information” service for purposes of the 1996 Act. However, the FCC has previously noted that “phone-to-phone” IP Telephony bears characteristics of a telecommunications service for purposes of the Act. As defined by the FCC,

³ In a series of orders, the APSC has treated fiber optic facilities as falling under its “telephone line” jurisdiction. An example would be in the APSC’s inclusion of fiber optic facilities in its regulated depreciation schedules. (For example, see Nov. 6, 1995 Order in APSC Docket U-3637 approving depreciation rates for various telephone plant accounts, including Account 2232.10 (Circuit-Fiber Optic) and Account 2422.20 (Underground Cable—Non Met.)

phone-to-phone IP Telephony Service consists of services in which the provider: (1) holds itself out as providing voice telephone service; (2) does not require the use of a computer to transmit the message; (3) allows a customer to call telephone numbers assigned in accordance with the North American Numbering Plan; and (4) transmits customer information without change in form or content. *See FCC Report to Congress (Universal Service)*, 13 F.C.C.R. 11830 at paras. 88-89, (Apr. 10, 1998). The FCC is currently examining this issue and has sought comments on a petition filed by AT&T seeking a ruling that such service is exempt from interstate access charges. (Public Notice, *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-To-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, DA 02-3184, (FCC rel. Nov. 18, 2002).) In addition, the FCC is considering a petition by one of the leading providers of phone-to-phone IP telephony, Vonage, to classify its service as an information services for purposes of the 1996 Act. *In the Matter of Vonage Holdings Corporation's Petition for Declaratory Ruling*, WC 03-211 (FCC Sept. 22, 2003).

There will undoubtedly be calls for the Commission to delay any action until the FCC rules on the AT&T and Vonage proceedings. However, this issue is too important to be relegated to federal regulators since it is the APSC, not FCC Commissioners, who are answerable to Alabama consumers for the activities of telephone providers and the availability of affordable telephone service.

There is an emerging awareness among states of the need to enforce state regulatory laws with regard to IP Telephony. Several states, including California and Wisconsin, have notified VoIP providers that they should seek necessary certification, while numerous states, including California, Pennsylvania, New York, Illinois and Ohio have initiated proceedings of various

types to address the issue.⁴ New York has previously found that an IP Telephony provider was required to pay access charges for the origination and termination of certain traffic. *Frontier Telephone of Rochester v. US DataNet Corporation*, Case 01-C-1119 (NYPSC May 31, 2002).⁵

V. IP Telephony Providers Should Pay Access Charges for the Origination and Termination of Intrastate Interexchange Voice Communications in the Same Manner as Other IXC's.

In *Frontier*, the NYPSC held that Frontier was entitled to originating access from US DataNet for both "line side" (Feature Group A) and "trunk side" (Feature Group B) access utilized by the provider, even if the transmission of the call uses IP technology after it was handed off to US DataNet. This Commission should reach a similar conclusion and hold that IP Telephony providers are subject to the same rules as other IXC's when they use the public switched telephone network to originate or terminate voice communications. The Commission should reach such a conclusion regardless of whether it asserts jurisdiction over IP Telephony.

Given the high cost of providing rural service, it is vitally important that all carriers pay appropriate fees for the use of rural ILEC infrastructure. Indeed, to meet the APSC's goals of ensuring affordable local service and an expansion of rural broadband deployment, the APSC must either maintain existing inter-carrier compensation system or replace it with another funding mechanism. Neither scenario is possible if IP Telephony providers are allowed to avoid the

⁴ The ILECs acknowledge that Vonage recently obtained a court order in Minnesota prohibiting the Minnesota Public Service Commission from seeking to regulate its service, however, they would respectively submit that this decision was wrongly decided and will not be sustained on appeal. Memorandum and Order, *Vonage Holdings Corporation v. Minnesota Public Utilities Commission*, Civil No. 03-5287 (D. Minn. Oct. 16, 2003). The decision is also contrary to orders in other jurisdictions where VoIP Telephony, and specifically phone-to-phone IP Telephony, has been carefully analyzed.

⁵ The NYPSC is current considering a complaint filed against Vonage regarding its IP telephony service. *Complaint Of Frontier Telephone Of Rochester, Inc. Against Vonage Holdings Corp*, Case 03-C-1285 (NYPSC notice issued Oct. 9, 2003).

payment of access charges for their use of the public switched network and remain beyond the reach of this Commission.

VI. Other Issues.

The Commission's decision in this case will also help determine whether all providers of telephone services are treated the same for purposes of state and local taxes and fees in Alabama. In addition to the Utility Gross Receipts Tax, providers of intrastate and interstate "telephone services" are subject to a 6% Utility Gross Receipts Tax. ALA. CODE § 40-21-80(a)(11) (1998 Repl. Vol.).⁶ All property if used in the business of the ILEC is classified as "Class I" property for purposes of ad valorem taxes, pursuant to ALA. CODE § 40-8-1 (1975) and is at a special higher rate of 30%. In addition, ALA. CODE § 11-51-128 (1975) provides authority for municipalities in Alabama to adopt ordinances charging a "privilege" or "license" tax from persons operating "long distance telephone lines," subject to graduated caps based on the population of the incorporated area. If the law is to be applied consistently, IP Telephony providers must be subject to the same taxes as other providers of telephone services.

Commission supervision is also required to ensure that IP Telephony providers provide access to the 911 network and pay E-911 fees to Emergency Districts in Alabama. Most IP Telephony providers do not offer 911 access as part of their standard service offering. Customers that do obtain 911 access as an option from their IP Telephony provider are not typically connected to the Public Safety Answering Point ("PSAP") in a fashion that allows location and telephone number information to be automatically transmitted to the emergency personnel. The Commission is currently considering a petition by the Alabama National Emergency Number Association ("ANENA") seeking assistance in verifying the payment of 911

fees by CLECs. *Petition of Alabama National Emergency Number Association*, Docket 29017 (APSC May 1, 2003). Such problems will be compounded if the Commission fails to act in this docket.

Respectfully Submitted,



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Keith S. Miller (MIL080)

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⁶ In 2001 Ala. Acts 1090, the definition of "telephone services" contained in ALA. CODE § 40-21-80(a)(11) (1998 Repl. Vol.) was amended to include "interstate telephone service which originates or terminates within this state but does not both originate and terminate in this state and is charged to service address in this state."

EXHIBIT "A"

ALLTEL Alabama, Inc.
Ardmore Telephone Company, Inc.
Blountsville Telephone Company
Butler Telephone Company, Inc.
Brindlee Mountain Telephone Company
Castleberry Telephone Company, Inc.
CenturyTel of Alabama, LLC
Farmers Telephone Cooperative, Inc.
Floral Telecommunications
Frontier Communications of Alabama
Frontier Communications of Lamar County
Frontier Communications of the South, Inc.
Graceba Total Communications, Inc.
Gulf Telephone Company
Hayneville Telephone Company, Inc.
Hopper Telecommunications Co., Inc.
Interstate Telephone Company
Millry Telephone Company, Inc.
Mon-Cre Telephone Cooperative, Inc.
Moundville Telephone Company, Inc.
National Telephone of Alabama, Inc.
New Hope Telephone Cooperative, Inc.
Oakman Telephone Company, Inc.
Otelco Telephone, LLC. (formerly
Oneonta Telephone Company, Inc.)
Peoples Telephone Company, Inc.
Pine Belt Telephone Company, Inc.
Ragland Telephone Company, Inc.
Roanoke Telephone Company, Inc.
Union Springs Telephone Company
Valley Telephone Company